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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Amendment of the Commission's	)	PR Docket No. 93-35
Rules to Provide Channel	)	RM-7986
Exclusivity to Qualified	)	
Private Paging Systems	)	
at 929-930 MHz	)	

To: The Commission

COMMENTS OF RADIOFONE, INC.

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SUMMARY

Radiofone, Inc. opposes the proposed grant of channel exclusivity to 900 MHz private carrier paging systems. Implementation of this proposal, coupled with the companion proposal to eliminate eligibility requirements for private carrier paging (PR Docket No. 93-38) would severely undermine common carrier paging as a meaningful service, thereby contradicting both the letter and intent of Sections 2(b), 221(b) and 332 of the Communications Act of 1934, as amended. In this regard, the action would improperly pre-empt state regulatory authority over those matters reserved to the states by the Act. The courts have

the Act, and alien ownership restrictions.

Accordingly, it is respectfully requested that the Commission abandon its exclusivity proposal in this docket.

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Radiofone, Inc. (Radiofone), by its attorney and pursuant to Section 1.405(b) of the Commission's Rules, 47 C.F.R. §

changes, since Radiofone will be affected in a direct and tangible way with regard to both of its services.

II. OVERVIEW

Radiofone opposes the proposed grant of channel exclusivity to 900 MHz private carrier paging (PCP) systems. Implementation of this proposal, coupled with the companion proposal to eliminate eligibility requirements for PCP (PR Docket No. 93-38), would severely undermine land mobile common carriage as a meaningful paging service, thereby contradicting both the letter and intent of Sections 2(b), 221(b) and 332 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. §§ 152(b), 221(b), 332 and improperly preempting state regulation.

III. IMPLEMENTATION OF THE COMPANION PROPOSALS WOULD STRIP AWAY THE ONLY SIGNIFICANT OPERATIONAL DISTINCTIONS BETWEEN COMMON AND PRIVATE CARRIER PAGING, UNDERMINING THE VIABILITY OF COMMON CARRIER PAGING AND THE PURPOSE IT SERVES.

Under the Commission's proposal, "PCP systems consisting of six or more transmitters would be entitled to channel exclusivity in most service areas, and larger systems could obtain regional or nationwide exclusivity." NPRM at para. 2

private carrier paging eligibility requirements. Notice of Proposed Rule Making, PR Docket No. 93-38 (Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals) (released March 12, 1993). Implementation of these proposals would hinder common carriage in paging by making it operationally indistinguishable from private carrier paging, while still retaining statutorily mandated regulatory disincentives imposed on common carriers.

As a result of a series of Commission decisions over the past 15 years, permissible operations of most common carrier paging licensees and private carrier paging licensees (PCPs) already are very similar. PCP systems operating in the 900 MHz band operate under effective radiated power (ERP) constraints nearly identical to those of common carrier 900 MHz operations, with most stations able to operate at 1000 watts ERP. Compare Rule Section 90.494 with Rule Sections 22.502(c) and 22.505(b). High power VHF PCP operations actually enjoy an advantage over their common carrier counterparts, since the common carriers are under a 500 watt ERP limit, while there is no limit on the PCP operations. Compare Rule Sections 22.502(a) and 22.505(a) with Rule Section 90.205(b). And limitations on direct interconnection of PCP systems with the public switched telephone network has not proven to be a legitimate distinction, since most common carriers find it more spectrally efficient to utilize the same "store and forward" mechanism to batch their pages, as is used

by PCPs. Use of this mechanism has been deemed by the courts to provide the necessary "break" in connection with the public switched telephone network to avoid the interconnection limits on PCPs. See Telocator Network of America v. FCC, 761 F.2d 763 (D.C. Cir. 1985). Thus, both PCPs and common carriers already employ virtually identical operations in delivering paging service, and the prohibition against reselling of telephone service by PCPs has not affected their pricing of service in any way. Finally, neither common carriers nor PCPs are required to be Part 90 eligibles, and both may provide paging service on a commercial, for-profit basis.

However, common carriers still receive important benefits in exchange for submitting to sometimes onerous state and federal common carrier regulations. Common carriers presently may serve any customer; and are generally granted exclusive use of frequencies. These two benefits at least partially have fulfilled the traditional bargain struck between the sovereign and common carriers: The common carrier agrees to abide by consumer protection regulations not imposed upon other businesses in exchange for certain privileges conferred by the sovereign.

The Commission proposes finally to unhinge the bargain, by expanding these privileges to PCPs, but still leaving common carriers subject to the same common carrier requirements. For example, common carriers still would be subject to state entry, service and rate regulation, the

nondiscrimination and "reasonable rate" requirements of Title II of the Act, as well as state, and possibly federal tariffing requirements. See AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992). While PCP licensees can pick and choose the prime customers, common carriers must serve all comers. "A common carrier must be held to a very high standard of public service which is even greater than that required of a broadcaster." Microwave Communications, Inc., 18 FCC 2d 953, 973 (1969) (Dissenting opinion of Commissioner Lee). Common carriers [redacted]

carriage, stating that "[u]nlike in the common carrier service, private radio service frequencies are generally nonexclusive and have no guarantee of protection from interference."[1] Where the limiting principle of exclusivity has been expanded to private carriage, the private radio service spills out and swallows up common carriage. By unhinging the common carrier bargain to grant identical privileges to PCPs, and by abolishing the limiting principle of exclusivity, the Commission undermines the ability of common carriers to carry out the role assigned to them by Congress, and unlawfully inhibits the ability of each state to safeguard its citizens with regard to those matters left to state jurisdiction under the Act.

The relevant legal issue is not what effect the Commission's proposal will have on PCPs. Rather, the Commission should consider the effect on common carriage wrought by these proposed changes. Paging companies will no longer have an incentive to maintain their common carrier status, creating artificial pressure in the marketplace that could strand substantial imbedded investment by common carriers. As demonstrated below, disintegration of common carriage in paging violates the letter and intent of the Act, and unlawfully preempts state regulation.

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[1] Telocator Network of America v. F.C.C., 761 F.2d 763, 764 (D.C. Cir. 1985).

IV. THE PROPOSAL UNLAWFULLY PREEMPTS STATE REGULATION BY ELIMINATING STATE CONTROL OVER SERVICE INTENDED TO BE COMMON CARRIAGE

A. The authority delegated by Congress purportedly supporting the proposed action is general, and not specific to the action.

> First, an agency literally has no power to act, let alone pre-empt [state regulation], unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted . . ..

Louisiana Public Service Commission, 476 U.S. 355, 374 (1986).

An examination of the nature and scope of delegated authority which may support the proposed action reveals general powers

classify radio stations, prescribe the nature of service to be rendered by each class of station, and assign bands of frequencies to the various classes of stations. 47 U.S.C. § 303.

However broad these powers may be, they also are very general. The Act does not mention exclusivity in connection with private radio services. The most specific authority arguably supporting the proposed action would be a Commission determination that award of exclusivity to private carrier paging systems would further the above mentioned policy goals, and is consistent with general powers to classify stations and assign spectrum. There is no indication of Congressional intent that the Commission displace state regulation of common carriage in paging -- the precise (albeit unintended) effect of the combined proposed rule changes.

B. <u>The proposed action would de facto preempt state regulation by removing radio service from common carriage.</u>

When it enacted the Communications Amendments Act of 1982 (Pub. L. No. 97-259, 96 Stat. 1087), Congress intended to "delineate the distinction between private and common carrier land mobile services" and the authorities regulating these services. 1982 U.S. Code Cong. & Ad. News 2237, 2298 (Conference Report, page 54). Thus, Congress made private carriage in the land mobile services mutually exclusive from common carriage. 47 U.S.C. § 332(c)(2). Congress also

removed Private Land Mobile Service from state regulation. 47 U.S.C § 332(c)(3). Therefore, by definition, whatever the Commission reclassifies out of common carriage becomes private carriage, and in turn is removed from state regulation.

As a practical matter, award of exclusivity is the "plum" attracting many paging companies to common carriage. The ability to become sole licensee of a paging frequency is an important business consideration. Even though the Commission has steadily eroded distinctions between common and private carriage through a series of decisions, the proposed action would have drastic destructive effect on the current status of common carriage. By removing frequency exclusivity from the "exclusive" domain of common carriage, the two services would become virtually indistinguishable. The D.C. Circuit recognized the practical and legal importance of exclusivity as a demarcation between private and common carriage by stating, "[u]nlike in the common carrier service, private radio service frequencies are generally nonexclusive and have no guarantee of protection from interference."[2]

From a statutory perspective, the proposed action would leave the states little to regulate. The proposed award of exclusivity to private carriage strips away the viability of common carriage. States would find themselves regulating an

[2] Telocator Network of America v. F.C.C., 761 F.2d 763, 764 (D.C. Cir. 1985).

empty shell, since the construct of common carriage could not be distinguished.

The states' practical influence over the paging business would diminish dramatically, even though they would continue to regulate existing common carrier paging systems. As noted above, the proposed action unhinges the bargain traditionally struck with common carriers. Even though common carriers would lose a key benefit, they still would be subject to the state and federal regulations and prohibitions discussed above.

As with other types of businesses, the market would move to the posture rewarded by government incentives. Most of the future growth in paging likely would be diverted to private carriage, due to Commission established regulatory incentives. Private carriers likely would continue to accumulate ever larger shares of the paging market. Common carriers likely would attempt to shift new customers to private paging frequencies, where available, and may even attempt conversion of existing systems to private carriage, where feasible. By awarding exclusivity to private carriage systems, the Commission would accelerate the effect of incentives channeling the paging market away from state regulation. Therefore, the proposed action would <u>de facto</u> preempt state regulation by inexorably removing from state oversight a service now known as common carrier paging. This result would accomplish through the back door what the Court

expressly rejected in NARUC v. FCC, No. 86-1205 (D.C. Cir. March 30, 1987) (Per Curiam), wherein the Court of Appeals found that the Commission's proposal to preempt state regulation of common carrier paging and mobile radio operations impermissibly ignored the powers reserved to the states by Section 2(b) of the Act.

C. The proposed award of exclusivity to private carrier paging systems must be abandoned, since it violates Congressional intent that states retain jurisdiction over common carriage.

States retain statutorily mandated authority to regulate common carrier stations. 47 U.S.C. §§ 2(b), 221(b). By breaking down the Congressionally crafted demarcation between private and common carriage in land mobile services, proposals in these proceedings would remove from state regulation radio service Congress intended to be regulated by the states. What presently, and properly under the Act, is land mobile common carriage would be impermissibly redefined as private, and removed from state oversight.

"The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." Louisiana Public Service Comm'n v. F.C.C., 476 U.S. 355, 369 (1986). Congress did not intend that FCC regulation supersede state regulation of the land mobile radio service demarcated common carriage. First, as noted above, Congress reaffirmed its support for land mobile common carriage by establishing in the Communications Amendments Act of 1982 a demarcation with private carriage.

Second, Congress long has intended that states regulate common

There is ample evidence of Congressional intent for continued state regulation of common carrier mobile services. By contrast, the Commission could point to only general, non-specific authorization for its proposed preemption action. It is respectfully submitted that by proposing to award exclusivity to private carrier paging systems, the Commission attempts to do what Congress warned against, i.e., use licensing powers to circumvent jurisdictional limitations.

The Commission cannot ignore that when its exclusivity proposal is considered together with its expanded eligibility proposal (and every other step taken over the past several years since the conclusion of Docket 18262 to "facilitate competition" between PCP and common carrier paging), the Commission is proposing to take the last step to remove any functional distinction between the two services. While the Commission may favor competition in general, the public interest standard against which the Commission's actions must be judged dictates that the Commission find that the public will benefit from more competition in this particular context. See Hawaiian Telephone Co. v. FCC, 498 F.2d, 771 (D.C. Cir. 1974). Common carrier paging is already intensely competitive. Indeed, at a time when regional and nationwide carriers struggle to recover the immense investment needed to construct their systems, competition could prove destructive

class of exclusive-use private carriers. The result of this unfair competition may very well be a loss of common carrier services and the stranding of considerable investment.

> "The common carrier has a duty to call the Commission's attention, when appropriate, to the possibilities of adverse impact from competition, because of its obligation to provide service to the public unimpaired; and, if the rates and charges or services of the common carrier are found wanting, Federal or State regulatory commissions generally have the right, upon a proper record, to compel necessary changes."

Gordon Evans, d/b/a Alert, 29 FCC 1215, 1218 (1960).

Common carriers were recently reminded of the burden to which they are subject in exchange for providing service to the public, in the Court's decision in AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992). And in accordance with the above quoted duty, Radiofone directs the Commission's attention to the real potential for adverse impact from the uneven competition inherent in the Commission's proposal.

The Commission's proposed changes ignore the important role played by common carriers, and the interest of the states in regulating communications services, especially when provided to individual citizens (i.e., consumers). With the expansion of eligibility to individuals, and the proposed exclusivity, a private carrier may "look like" a common carrier, but it will not be a common carrier. The states can regulate common carriers as they deem appropriate, in order to ensure reliable service, and to prevent unsophisticated

citizens from falling prey to scams, or substandard

[redacted][3]

CONCLUSION

WHEREFORE, it is respectfully requested that the Commission abandon the proposed action awarding exclusive paging frequencies to private carrier paging systems.

Respectfully Submitted,

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